IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.12.2007

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

and

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

Original Side Appeals Nos.239 and 264 of 2001

Pankaj Kumar Nevatia — Appellant in both the appeals

v.

1. Pradeep Kumar Nevatia
2. Prabhat Kumar Nevatia
3. Sumitra Nevatia
4. Shaiwalini Nevatia
5. Shobha Nevatia
6. Punitha Agarwal
7. Purnima Singhania
8. Rameshwar Prasad Nevatia
9. Balakrishna Nevatia
10. Baroda Industries (P) Ltd.,
11. Hindustan Mercantile Bank Ltd.,
12. M/s.Bharat Gold Storage (P) Ltd.,
13. M/s.Moon Corporation Limited
14. The Kodaikanal Co-operative Stores Ltd.
15. M/s.Hercules Hoists Ltd.
16. M/s.Bachharaj Factories Ltd.
17. M/s.Nevatia (P) Ltd.
18. M/s.Bajaj International (P) Ltd.
19. Modern Mills Ltd.
20. M/s.Bajaj Auto Litd.
21. M/s.Bajaj Hindustan Ltd.
22. M/s.Oudh Sugar Mills Ltd.
23. M/s.All India General Insurance Co.Ltd.
24. Park Town Co-operative Stores Ltd.
25. M/s.Akola Oil Industries Ltd.
26. Manjari Goel
27. Ashish Nevatia
28. Mayuri Mittal
29. Rashmi Imran — Respondents in OSA.No.239/2001

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1. Rameshwar Prasad Nevatia
2. Balakrishna Nevatia
3. Pradeep Kumar Nevatia
4. Prabhat Kumar Nevatia
5.Sumitra Nevatia
6. Shaiwalini Nevatia
7. Shobha Nevatia
8. Manjari Goel
9. Ashish Nevatia
10.Mayuri Mittal
11.Rashmi Imran

Respondents in
OSA.No.264/2001

Appeals are filed against the common order made by a learned single Judge of this Court dated 27.03.2001 made in Original Petitions Nos.95 of 1995 and 865 of 1997.

For appellant : Mr.M.L.Joseph

For Respondents : Mr.Sathish Parasaran for RR26,27,29

Mr.R.Subbiah for R30

JUDGMENT

K.RAVIRAJA PANDIAN, J.

The appellant Pankajkumar Nevatia filed the above two appeals against the common order dated 27.03.2001 made in O.Ps. Nos.95 of 1995 and 865 of 1997.

2. O.P. No.95 of 1995 was filed by the appellant under section 17 of the Arbitration Act, 1940 praying to receive and take on file the arbitration award dated 28.12.1994 handed over to the Registrar of this Court on 03.01.1995 and to pass a decree in terms of the said award and for interim relief of injunction restraining the respondents 12 to 27, the joint stock companies in which the parties were share holders, from issuing dividends, bonus, bonus shares, right shares and other benefits to anybody till the disposal of the petition. O.P. No.865 of 1997 was filed by Pramodh Kumar, the first respondent (in O.P. No.95 of 1995) under sections 30 and 33 of the Arbitration Act, 1940 to set aside the award dated 28.12.1994.

3. The learned single Judge allowed the OP. No.865 of 1997 by setting aside the award of the arbitrator dated 28.12.1994 and dismissed the O.P. No.95 of 1995. Aggrieved by that order, the appellant Pankaj Kumar Nevatia has put in issue the correctness of the order of the learned single Judge in these appeals.

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4. The facts, in short, are: A Hindu Undivided Family consisting of Kanhaiyalal Nevatia, the father and three sons Balakrishna Nevatia, Rameshwar Prasad Nevatia, S.K.Nevatia were running certain business under the name and styke of 'Kanyaiyalal Rameshwar Prasad Nevatia HUF'. S.K. Nevatia died in a car accident in 1975. The HUF was divided and got separated on 29.02.1980. Bimla Devi Nevatia, the widow of S.K. Nevatia, the four sons of S.K. Nevatia – Pramod Kumar Nevatia, Pradeep Kumar Nevatia, Prabhat Kumar Nevatia and Pankaj Kumar Nevatia along with their respective wives and their two sisters, i.e., the petitioner and respondents 1 to 9 in O.P. No.95 of 1995 appointed respondents 10 and 11,the paternal uncles of the petitioner, respondents 1 to 3, 8 and 9, as arbitrators jointly on 30.09.1983 to partition the assets and liabilities, business, goodwill, etc of the joint family with effect from 01.11.1983 and declared that the decision of the arbitrators would be binding on all of them.

5. The document appointing the arbitrators proceeded that 'the arbitrators would give their award on all the items of disputes regarding the above and in particular as to which assets, liabilities, business, etc.,belonged to the joint family and which belonged to the individual members; the value of the total joint family assets, good will etc., after deducting the liabilities and partition the assets, business, goodwill, etc., among the family members. The parties further agreed to submit all their claims and disputes in writing to the arbitrators latest by 30.09.1983 and further agreed that no claim would be entertained by the arbitrators after that date. The document further proceeded that the award would be given by the arbitrators on or before 31.10.1983. In order to make the award within the stipulated period, the parties agreed to submit their required accounts before 30.09.1983 and also agreed to offer the services of PL Khaitan for preparation of account of Nevatia Private Ltd, Poornima Agenices and other concerns. But none of the parties filed their statement before the arbitrators within the time specified. It is stated that the arbitrators passed an interim award on 01.02.1985 in respect of shares in the joint stock companies alone to the effect that all the shares would be divided into five equal parts and each son and the mother shall have one part each. As final award has not been passed, Pankaj Kumar Nevatia, the appellant in the appeals filed Application No.4794 of 1986 before this Court for extension of time for passing the award and the time was extended upto 04.01.1995. The arbitrators passed the final award on 28.12.1994 and delivered it to the Registrar of this Court on 03.01.1995.

6. The appellant filed O.P. No..95 of 1995 under section 17 of the Arbitration Act, 1940 for passing a decree in terms of the award. The respondent Pramod Kumar Nevatia resisted the same by filing counter contending inter alia, that the brothers, the petitioner, respondents 1 to 3 primarily held shares in several companies apart from 1/3rd share in the parent HUF Kanhaiyalal Rameshwar Prasad Nevatia HUF and 75% of the shares in Poornima Agenices. There was one immovable property at Door No.11, Wallace Garden, Madrs, which was acquired in 1966 out of the HUF funds, but in the name of the mother Bimla Devi Nevatia. This property has not been taken into consideration in the award. Though it was agreed to resolve the dispute through arbitration by the paternal

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uncles, respondents 10 and 11, none of the parties filed any claim statement either within the time stipulated or even thereafter. Even the interim award passed dividing the shares in the joint stock companies could not be regarded as an award as the same was not signed by both the parties, but by one only. Even at the time of passing the interim award or the final award, no sufficient particulars were available to the arbitrators regarding the working of Nevatia private limited, Poornima Agencies and the immovable property at Wallace Garden.

7. It was further contended that regarding business at Kanpur not even the profit and loss accounts were made available to the arbitrators. When these aspects of the matter were pointed out to the arbitrators, the second arbitrator, the 11th respondent insisted that the arbitrators would go only into the distribution of shares without going into the question regarding the availability of the other movable or immovable properties and the character of the properties – HUF properties or individual properties. It is further alleged that the first respondent Pramod Kumar was residing in Door No.11, Wallace Garden in the year 1986. During his absence, the third respondent Prabhat Kumar Nevatia has criminally tresspassed into the property. That made the first respondent Pramod Kumar Nevatia to file a suit in CS. No.354 of 1986 before this Court seeking for a declaration that the house property at Wallace Garden belongs to the HUF and also obtained an order of injunction in I.A. No.2324 of 1986 against the other respondents from alienating any share in the said property. Flouting the injunction order, the mother Bimla Devi sold the propery at the instigation of the other respondents. The contempt proceedings against her were closed because she died during its pendency.

8. It is further contended that the appellant Pankaj Kumar Nevatia instituted a suit in C.S. No.603 of 1987 against the members of the HUF seeking the relief of partition. In the plaint the appellant has, in uncertain terms, stated that the parties have not filed any statement before the arbitrators and by efflux of time, arbitration became dead and the arbitrators have become functus officio. He further stated that he would withdraw the Application No.4794 of 1986 seeking for extension of time for passing an award. However, total disregard to his own plaint averment, he did not withdraw the application. As the appellant filed a suit by totally abandoning the arbitration proceedings and in view of the averment contained therein, the first respondent has not taken any steps to oppose the application for extension of time. Further, the award was attacked by the respondent on the ground that the arbitrators did not hold any enquiry in the presence of any members of the family. They have not perused any evidence. Being the paternal uncles of the parties, they used their personal opinion and knowledge about the family affairs. The arbitrators failed to consider the question of availability of the properties, both movable and immovable and their character.

9. The first respondent Pramod Kumar Nevatia filed OP. No.865 of 1997 based on the averment contained in the counter affidavit filed by him in O.P. No.95 of 1995, to set aside the award. Both the O.Ps were taken together and as stated in the summation of facts they were decided by a common order allowing O.P. No.865 of 1997 and dismissing the O.P.

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No.95 of 1995. Hence, these appeals by the petitioner of O.P. No.95 of 1995.

10. Learned counsel for the appellant contended that there is no bar under the reference prohibiting the arbitrators to use their personal knowledge in resolving the dispute. The two arbitrators, being the paternal uncles, are more informed persons about the affairs of the HUF than any other third party and would bring about the best solution to the dispute. Non filing of the formal claim petition by the parties claiming their right, having regard to the reference which is only dividing the assets, among the members, cannot ipso facto vitiate the proceedings. The arbitrators did not solely confine to their personal knowledge about the affairs of the HUF, but relied upon the income tax returns in which there is no mention about the house property. Hence, the award passed by the arbitrator cannot be regarded as one coming within the purview of sections 30 and 33 of the 1940 Act.

11. On the other hand, the learned counsel for the respondents reiterated the factual position of filing of the suit by the appellant and filing of the suit for declaration of title regarding the Wallace garden property by first respondent and contended that the arbitration proceedings was given a go-by which is evident from the averment in the plaint of the suit and alternatively contended that when the matter has been referred to the arbitrators, the arbitrators have to pass an award in accordance with the statutory provisions only and passing of the award based on the personal knowledge cannot have any legal sanction.

12. We heard the learned counsel on either side and perused the materials available on record.

13. It is and admitted fact that the parties have entered into an arbitration agreement dated 31.08.1983 and appointed their paternal uncles respondents 10 and 11 as arbitrators. As per the agreement, the arbitrators were to effect partition of assets as on 01.11.1983. It is stated that the arbitrators issued notice to the parties to submit their claims on or before 30.09.1983. None of the parties submitted their claim statement and consequently no award was passed as per the agreement within the period, i.e., by 31.10.1983. The appellant, by filing the suit in C.S. No.603 of 1987, has categorically stated that the parties have not filed any statement before the arbitrator and by efflux of time, the arbitration agreement has become dead and the arbitrators have become functus officio. He has also stated in the plaint that he would withdraw the application in A.No.4794 of 1986, filed seeking for extension of time for passing arbitration award. Hence, he cannot support the arbitration award. There is yet another vital factor on record by means of a letter of the second arbitrator, the 11th respondent, informing that he was not willing to be an arbitrator, with which the learned single Judge has made elaborate reference by extracting the letter. From that it is evident that out of the two arbitrators to whom the matter was referred for arbitration – one has uncondionally expressed his unwillingess to arbitrate the proceedings and the award passed by one of the arbitrators cannot be regarded as an award as provided in the statutory provision of the Arbitration Act, 1940.

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14. Further, as per the arbitration agreement, the arbitrator was required to partition the assets, liabilities, business, goodwill, etc., of the joint family, w.e.f., 01.11.1993. The reference included all the properties of HUF, such as movables, especially shares of HUF in the joint stock companies immovable and other properties though there are different claims, one - that it did not form part of the HUF property and the other, the property was purchased by HUF including the house property at Rajasthan. In the award the property has not been included despite specific reference to the effect that the arbitrator would give a decision as to which assets, liabilities, business belonged to the joint family and which belonged to the individual members. It is also an undisputed fact that the award has been passed purely on the basis of the personal knowledge without there being any material evidence. The Arbitration Act does not provide for passing an award on the basis of the personal knowledge. The personal knowledge alone, in the absence of any agreement to that effect, be a basis for passing an award. In spite of the fact that the arbitrators are paternal uncles it could not be expected that they were aware of all sort of disputes between the parties and all the assets, such as shares and stocks or other movable or immovable properties possessed by the parties. Vide M/s. Tribal Engineering (P) Ltd. v. Indian Oil Corporation, 1998 (3) CTC 385. We are also not able persuade ourselves to accept the income tax returns of the HUF to be a conclusive proof for deciding the dispute between the parties.

15. Above all, it is obvious from the fact situation that even the interim award in respect of division of shares made by the parties has not been given effect to by any of the parties. All these would go to show that the parties have abandoned the arbitration proceedings. The appellant cannot take undue advantage of the irregular award passed by the arbitrators by misconducting themselves on the basis of a letter of this Court extending the period for completion of the arbitration.

16. Though the reference made to the paternal uncles might appear to be well advised, they being the creature of the agreement would act in accordance with the terms of reference only. The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure not only manifests the disregard of his authority or misconduct on his part, but it would tantamount to mala fide action and is liable to be set aside. Vide Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises, (2000) 2 LW 729 (SC).

17. For the foregoing reasons, we find no merit in the appeals. The appeals are dismissed. No costs.

sd/-
Asst.Registrar

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Sub Asst.Registrar

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To

The Sub Assistant Registrar,
Original Side,
High Court, Chennai.104.

+ Two ccs to M/s. Surana & Surana , SR.74853 & 74852

+ one cc to Mr. R. Subbiah, SR. 75231

+ one cc to Mr. Sathish Parasaran, SR.74832

BS(CO)
RP 28.12.2007.

OSA Nos.239 and 264 of 2001

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